IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA, : CRIMINAL NO.:

Plaintiff, : JFM-09-328

vs. :

HARVEY M. NUSBAUM and JACK :

W. STOLLOF, : Baltimore, Maryland

Defendants. : November 13th, 2009

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The above-entitled case came on for motions hearing before the Honorable J. Frederick Motz, United States District Judge.

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A P P E A R A N C E S

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P R O C E E D I N G S

THE COURT: Good morning.

THE CLERK: The matter now pending before this court is criminal docket number JFM-09-0328. United States of America versus Harvey Nusbaum, et al. Seated at counsel table for the Government is Shane Cralle, Matthew Bester, Mark Grundvig, John Terzaken and Nancy McMillen. Seated at counsel table for defendants are Joshua Treem, Nicholas Vitek, Stephanie Gallagher, Paul Sandler and Matthew Esworthy, along with their clients, this matter comes before the Court for a motions hearing.

THE COURT: All right. This is all legal argument Martina, so you're free to stay, you're free to go. There are all kinds of motions pending which we'll go through in due course. I mention -- it would ordinarily be my practice to state at the outset some of my tentative views, but I've actually done that by telephone because government counsel arranged a conference call with all counsel, I think to probably figure out what to work on. And I think on Wednesday I spoke to people and I stated my tentative view.

Like I said, everybody would have to be prepared to argue everything, but one issue which seems to be a major issue cutting across some of the motions is the joint venture defense. And I let you all know my tentative view was I was really not impressed with the defendant's position

because there doesn't seem to be at this point any factual basis for the joint venture defense. I think I used the adjective silly, but I think that was an overstatement.

But the -- but I guess I need to hear from the defendant as to, you know, as of -- you know, it seems to me what the defendants are -- I mean, I will put it bluntly, it looks like they're accused of bid rigging, that they went through the cases to find out what possible defenses, they found a Supreme Court case that there was a joint venture defense and then said, well, we're going to assert that but -- and we're not going to tell you what the facts are because it's a criminal case, and various things follow from that in terms of the pretrial ruling.

And it seems to me the Supreme Court case, there clearly was a joint venture, it was formal, it was established. I don't have anything in front of me now to suggest that there was any kind of joint venture. And I think I'm entitled to know at this point, and the government's entitled to know to flesh that out a little bit. So let me hear about either why I shouldn't be told anything more about the joint venture, if I am told it should only be ex parte or what the basis is.

Mr. Sandler?

MR. SANDLER: Thank you. Good morning again, Your Honor.

THE COURT: Good morning.

MR. SANDLER: As always I appreciate the Court's candor and assistance to counsel, because during our telephone conversation, when you expressed your tentative view and pointed out that there would still be argument, although an uphill battle, I welcome the challenge because I think this is an important issue. And a matter that hopefully when I conclude you will at least say that the matter was meritorious to present. Even --

THE COURT: I have no doubt it was meritorious to present.

MR. SANDLER: Even if you don't agree. But I'll set the stage this way, although I will comment when you did schedule today's argument I didn't check any calendar and appreciate that it was Friday the 13th. And then I checked the docket for the trial and I see that the Ides of March is maybe in the middle of our trial. And since I'm very superstitious it doesn't necessarily auger well for me.

THE COURT: Well, it could be against the Government, I don't know.

MR. SANDLER: I don't think so. But let me explain to you what I really think this is all about. It all started when we were in your chambers and you asked how long the trial would take. Government said one time period, I said another. And you said why. And I said because we

have expert witnesses. And you said what will they say. And I said with due respect let's wait till trial. And you said, well, let's tee this up because I want to find out what's going on. And you asked me to proffer areas of the expert's testimony, which I did.

I also took a further step in alerting the Court and counsel to what I thought was a valid and appropriate, which you'll see in a few minutes, defense. And then which was the single entity defense, that if we do go to trial and if the government meets its burden and if we put on a defense, the defense was, in truth, factually and legally, that the relationship of the parties, being that of a single entity, joint venture, made the defendants not susceptible to antitrust bid rigging. And then we waited and the Government --

THE COURT: Let's -- I understand, at least would be the rule of reason and not a per se violation--

MR. SANDLER: I could not hear.

THE COURT: I'm sorry maybe -- it would still be subjectively a rule of reason, well, actually maybe not.

MR. SANDLER: Maybe not. The analysis could go either way. Now, it's not as if, and I appreciate the suggestion that maybe counsel, as a defense attorney, in the many criminal cases you hear, where obviously when many cases come before you some instances a lawyer might look in

a book and say, hey, let's try this. But I'm going to prove to you unequivocally that that didn't happen. But I do want to set the stage and talk to you with pure reason. Pure logic, deductive analysis. I would like to present to you the reason you should allow the defendants to put on evidence of a joint venture is deductively analyzed and conclusively valid.

First a major premise. If you accept under the law that a single unit entity, if valid, has a valid defense to a bid rigging case under the Sherman Act, if you accept that, then the minor premise in this case is whether the defendants here are a valid single unit entity. If so, the inescapable conclusion is that they are not susceptible to an antitrust bid rigging case under applicable law. It's more than just *Dagher*. And of course *Dagher* can be distinguished, why? Because *Dagher* under the FTC was a known indisputable joint venture.

But there are other cases besides *Dagher*. First *Copperweld* started the precedent. And then as you know, the *Needle* case is very much at issue in terms of not the single unit entity defense, but whether the NFL can get all its groups -- franchises together and say we're going to use one vendor, where a jealous vendor claims, wow, this isn't right, this is a violation of antitrust. And the NFL says, wait, we're a single unit entity. Now, the government as

you know, from our briefing, is involved in that case. And the government in its -- never disavows the single unit entity theory, not at all.

And the cases that I cited, you know, before you in our brief all recognize that the single unit entity is correct. And even discuss how the defendant has a right to present evidence. And it's a fact specific issue. And those cases are --

THE COURT: What are the facts here? What facts --

MR. SANDLER: Okay. Now, I'm --

THE COURT: I don't have to -- I mean, it's like entrapment, you don't -- I have an obligation not to present to the jury defenses that have no factual basis. So I need to know -- I mean, I just have no idea what the --

MR. SANDLER: Of course you don't, because it was not my understanding that it was, A, required at that juncture, before now to present facts. Also, it's a very delicate situation, because I hope you respectfully appreciate -- in one way this is a case of first impression, because here there are very -- other than in the civil law realm, there are no criminal cases, or maybe there's the *Brinkley* case and *Romer* they only touch upon it, but there's really no book -- speaking of books to turn to, that you can gain a way to proceed. I can say that the trial is in

March. This is a -- Mr. Nusbaum is a defendant, as is Mr. Stollof. It's very awkward to be able to convey the factual defense on the merits so early in --

THE COURT: It's not early. It's not early. The criminal law is not like the civil law. I mean, the facts are the facts. I've got to plan my trial schedule. And as I said before, the length of trial is going to be much determined by whether or not expert testimony about -- and I need to know. And because I have an obligation not to present to the jury --

MR. SANDLER: I'm ready to present the facts.

THE COURT: Okay. Good.

MR. SANDLER: And I would ask this one consideration, some of the facts I might touch upon would be considered privileged, confidential or grand jury information and I either -- I would like the Court to approve my using them at this time if I must.

THE COURT: Sure.

MR. SANDLER: Thank you. And, finally, I'd like to say to the Court respectfully, that I respectfully object to being required to present the facts in open court without -- without an ex parte opportunity, and I point out that I understand your ruling, but I want to make the record, because counsel have been criticized in some of the cases for not seeking an ex parte opportunity.

THE COURT: No, obviously you have your objection to that. And it's fine. It's good to make the record on it. But I -- all I want is a proffer.

MR. SANDLER: In sharing the facts with Your Honor I would like --

THE COURT: And let me just say, and I am just generally uncomfortable with ex parte proceedings generally because I --

MR. SANDLER: I understand.

THE COURT: Because I believe in the adversary process. It's not that I want you to have to divulge things, but I just couldn't do my job without having the government being able to respond to your proffer. But you made your record and you should.

MR. SANDLER: Thank you. Now, I will also introduce at the proper time a book with probably what I consider a half a pound of facts. Maybe I need a pound to persuade you, but I ask you to consider the threshold burden that I have in making this proffer. For example, I do not believe under the case law I need show more than a very minimal predicate to go forward with the defense. And I ask you also respectfully, very respectfully, to consider viewing the facts I give you in the best light of the defendant. And not interpret it as a ground of cross-examination or counter argument to show why those

facts are not valid, or that it's not credible, or that the government has counter facts. Because that would obviously result in any case where a defendant presents facts in this controversial case that brings so many good, talented lawyers from the government here, it's naturally going to be controversial. So let me start with the facts.

THE COURT: It looks pretty equal on both sides.

MR. SANDLER: Let me start with the facts. I first would like to acquaint Your Honor in a minute with what we're talking about in terms of the bid rigging allegations. The bid rigging allegations come under the context of tax lien auctions, which you may be familiar with in municipalities in Maryland and even elsewhere in the country. When a municipality does not receive taxes or payments of water bills, which facts undisputedly reflect are legion in terms of circumstances. An account receivable is accrued. And annually an auction is conducted to auction off the liens -- it's not actually a lien, but auction off the accounts receivable which in effect becomes a lien, a tax lien.

The auctions are variable, so you can't generalize in terms of the nature of these auctions. Some auctions are live where you would raise your hand. The typical auction you would see, you know, in the movies or going to an art auction, that type of thing. Other types of auctions

involve sealed bids. Still another version of the auction would involve a computer, electronic. The auction, which is important to appreciate, is for the highest bidder. Not the lowest bidder, it's the highest bidder.

And in addition, what's interesting about this type of auction is you may bid -- you do not pay for your negotiable instrument lien, tax lien, you do not pay the amount you bid. You could bid -- the tax lien could be $1000, you could bid $15,000. You don't pay $15,000, you pay the amount of the lien. And you also pay a deposit, which the term of art is called a high bid premium. The high bid premium was instituted around 2000, the year 2000, because some auctions got out of hand where somebody would be bidding $2 million and they'd pay $6,000 for a lien.

So to curb this runaway situation, legislature has enacted this high bid premium. So that if you bid a certain amount over the assessed value a formula kicks in. And you give a deposit called the high bid premium at the time you pay for your liens. High bid premium is returned. That just generally gives you the idea of the milieu of this auction.

So proffer, Mr. Nusbaum and Mr. Stollof were friends and business partners for years, and they were involved together in tax lien auctions. They joined together with what I'll call the Berman group, because of

their business relationships. And the way that the relationship developed over the years was that they formed, and Mr. Nusbaum in particular thought, understood, and declared publicly, that he was in partners with Mr. Berman. And he understood this to be a partnership similar to the way he had his relationship with Mr. Stollof, but they formed this larger group.

Now, to point out, the first proffer that I wanted to suggest to you, is that the -- when the loans were made to Mr. Nusbaum and Mr. Stollof by the bank, it was Provident Bank, because when they would bid on auctions they would borrow the funds, Provident Bank then was the lender. And Provident Bank would lend large sums of money, could be upwards of $20 million. And Provident Bank was fully aware of the partnership relationship between the Berman group and the Stollof group. In fact, you will see that the banker, Mr. Gregory John Campanaro, I predict, if I can question him at trial, would corroborate that Provident Bank understood that they were teaming up together, that they were partners, and that they were sharing resources. And I'll get into that. And that that would be an indicia of this joint relationship.

THE COURT: Or is it indicia that he's a co-conspirator?

MR. SANDLER: Well, you can look at a glass of

water and say it's half full or half empty, it's for the jury to decide what the --

THE COURT: Maybe so, maybe not.

MR. SANDLER: Well, that's my --

THE COURT: I understand.

MR. SANDLER: Okay. Well, here's the -- can we see this? I'm not sure. Can you read this, Your Honor?

THE COURT: Yes.

MR. SANDLER: You can scan through to see some of the projected bases of saying that Mr. Nusbaum formed a partnership.

THE COURT: Is this from the grand jury?

MR. SANDLER: This is a 302.

THE COURT: A 302, okay.

MR. SANDLER: I can't speak --

THE COURT: Okay. That's fine. I assume he's a government witness?

MR. SANDLER: I beg your pardon?

THE COURT: I assume he's a government witness, is that --

MR. SANDLER: I assume. Yes. But that doesn't mean when I cross-examine --

THE COURT: No, no, no, I just want to understand the context.

MR. SANDLER: What I showed you was a sample. I

don't think I need to take you through every document because I'm summarizing. It's more of the same. In essence, this particular witness would testify that he understood, was told that there was a partnership, that they were teaming together, they were sharing liens, that they were sharing information. And of course, the definition of a joint venture, pretty standard in Maryland, and I proffer and have in here excerpts of an expert witness who I would present to the jury to explain what the joint venture is, to explain what the elements of the joint venture, to testify that the observation of the conduct of the parties was consistent with the joint venture, was -- the perfect type of example of a joint venture. He would also point out that parties can be in a joint venture, teaming arrangement if they don't know it.

THE COURT: Let me ask on the most fundamental level, what is the difference between joint venture, in your view, and bid rigging?

MR. SANDLER: That's a very good question and the answer is supplied by the case law. If the parties get together with the intention to share their profits, to demonstrate by pooling resources together, they can produce economic efficiencies with a procompetitive impact on the market, it is a valid joint venture and is not bid rigging. And I will produce a witness to demonstrate that by

virtue -- as I walk through the elements of this joint venture, by virtue of these people working together there was more competition in the market. And I will be able to demonstrate that the economic efficiencies identified by Professor Priest, who's an economist and a professor at Yale, who will testify, and I have excerpts of his report. So you can see this is not just someone who pulled a book out and said, gee, let's do this.

And the point that I'm going to make further, with all due respect, is if this were what you -- and I don't blame the Court -- I shouldn't say that, I do not find argument with the Court to for its early assessment that this seems to be something --

THE COURT: Well, it does, because it seems to be -- and I don't understand why that doesn't turn antitrust law on its head. There are per se violations. And even -- and the whole purpose of the per se rule is, among other things, to prevent evidence about whether -- the defendant thought something was procompetitive. So that -- it seems to me that what you've just proffered is it may be true, but this turns the law on its head. Because the whole idea of a per se violation is you can't do it even if the defendants believe that it's procompetitive to do it.

MR. SANDLER: No, I don't think it does at all. I don't think the antitrust law is turned on its head.

Although, I have to suggest to the Court that if one reads the commentary and watches this law over the years, there are some individuals who claim that the single entity defense does just that. And some predict a total evisceration of the Sherman Act. But that's not this case, because it's clear if this did not have a procompetitive impact, and if this were not a legitimate teaming agreement, with the economic efficiencies that have to exist, then it doesn't qualify.

It's a two-prong test. That's where my confusion came in. I started with the law, the major premise. The minor premise are the facts and the economic efficiencies. I could not, in my view, convince the jury, if I just brought in Professor Booth, my expert on corporate law, who used to teacher here at University of Maryland law school now is at Villanova. He would opine as to the elements of a joint venture and talk about those elements in pure corporate law. But that's not enough. I would have to satisfy antitrust requirements. I would have to satisfy, for example, the government's own statement in their policy, which as you saw was very important to this. The government recognizes that there's a single unit entity.

Is that -- do I have it right side up, Your Honor?

THE COURT: Yeah, I see the headline, is that what I'm supposed --

MR. SANDLER: Okay. And then you can see the -- this is from the government's own manual. In addition to that, if the Court please, in their own briefing the government acknowledges the single unit entity defense very clearly, which I point out -- which I pointed out to you in my briefing. If you examine the Supreme Court case, the *Needle* case. Which incidentally is going to be argued in mid-January. But it doesn't relate to this case because it's one of those factual cases. Can all the franchisees of the NFL and the NFL be one entity? You know, that's the issue. And that really springs from *Copperweld* which predated *Dagher*.

Just look, respectfully, at the quote that I highlight for you from the government about the application of *Dagher* and the single entity concept. So it's a factual issue is what I suggest. And I have case law that says just that, that it would be premature for the Court to say, Counsel, I reject this, you may not defend on this case, you may not try to persuade the fact finder. Could be you, if we waive a jury trial.

THE COURT: No, no, it's got to be a two-way street.

MR. SANDLER: I'm not -- I am not going to allow you to do this. But look at the decision in the *Gazette* case, which I show you. The proper characterization of a

joint venture here would appear to require a fact specific undertaking. The legality of a joint venture will depend on the purpose and nature of the enterprise, the situation of the partners and their place in the market. So we switch, in answering your question about how this differs from any bid rigging case, we move from the facts to the law. And I'll return to the facts.

But I want to make sure I'm clear in my answer to the question. That in taking these facts most favorably to the defendant, in the *Ricks* case, our own 4th Circuit clearly says, United States against Ricks, in determining this efficiency of the evidence to support a criminal defendant's request for a jury instruction -- I'm not even asking for the instruction at this point, I'm backing away from that rather optimistic approach, retreating to the bare necessity of letting -- asking you to allow me to adduce evidence to show the trier of fact -- but must be taken most favorable to the defendant."

Now, if -- to make it very clear, I respectfully suggest, that the answer to your question lies in the proof of the facts, it must be I cannot survive by simply saying, a-ha this is a joint venture, because the joint venture has to have a profile that satisfy the antitrust requirements. It has to have an integrated core purpose whereby joining together there are efficiencies of economy, and those

efficiencies of economy must result in a procompetitive impact on the market.

And I point out to Your Honor, it is inherently inevitable to our society that a per se criminal case like this would exist any way. That's been litigated before. It's been very troublesome to jurists and lawyers throughout the country. Because here these individuals are being charged allegedly with agreeing to do something in the market and they're not able to show that whatever they did had no harm. They're just, boom, here it is, there they go. And that is an important principle that we must respect, because that's the law.

But just as we respect that law, and the Justice Department respects it and urges that it is applicable, we also should respect the Supreme Court's ruling, and the other jurisdictions that have followed it, to allow a fact specific undertaking if I can show sufficient facts. I've only given a little bit of the facts. So I'd like to return to the facts, because they're overwhelming in terms of what I can show. I regret, and once again, I object to my having to go this route, but I have no choice, none whatsoever.

THE COURT: You're right.

MR. SANDLER: But thank you, Your Honor. Now, I also would point out to you that in the testimony of Mr. Campanaro, the banker that I've just mentioned to you, that

I predict what he said, he would also point out that when the monies were loaned to the Nusbaum Stollof group, because each group had its separate financing, which I'll explain, there were reams of paper that constituted loan documents. And in these loan documents there was statements of what the procedure was between the group.

And it would say, for example, "Mr. Stollof, Nusbaum here -- I'm not going to mention another name -- will join forces this year, as they have done in the past, for the purchase of liens in Baltimore City. After the sale, the purchased liens will be divided between the four individuals with bank financing provided." So the bank loan documents even reflect that Mr. Nusbaum, which the banker said told them that he was a partnering.

Another document, which I'm going to submit in this proffer book, "They joined forces this year, as they've done in the past, for purposes of purchasing liens. The borrowing team with Steve Berman," this is Mr. Nusbaum and Stollof, this is the bank document. Dozens of people would have studied and reviewed these documents, because a bank doesn't lend $20 million on a hand shake. Maybe they did in the 1800s, but they don't today. So bankers and presidents and vice presidents and loan committees all read and studied this. And all understood that this was a partnership, just the way the Stollof and the Nusbaum were together, although

there was no writing, there doesn't have to be. In the Stollof and Nusbaum there were writings. But it doesn't have to be writing. Professor Booth will explain that to the jury.

Here, another sample: "The borrower team with Steve Berman in 2004 purchase of 807 Baltimore County tax liens totaling $7 million. The purchase included 11 commercial liens for the sole ownership of Mr. Berman because of the time required to allocate the liens between the parties after purchase Provident funded -- shored up the funds." Another example, as in the -- this is from the Provident -- and in the proffer book I have the actual documents, because I don't want the Court to just -- I would like the respect of the Court to honor counsel's word, but I think it's imperative that counsel supply the back up data so the Court has a primary source. But here's a summary, "As in the five Maryland jurisdictions in 2005, the borrower will be partnering with Steve Berman for the purchase of liens." Partnering.

And all this is to demonstrate that one of the ingredients, although not a necessary ingredient of a partner, is to intend to do it. And I wanted to emphasize this aspect of the proffer, may it please the Court, to let you think more broadly about your initial reaction, which I know is very difficult to change in any of us, particularly

I know that's very difficult to --

THE COURT: Summon my wife.

MR. SANDLER: -- alter your thinking. But it could not be if I opened a book and said, hmmm, here's an interesting case, let me try to fit the facts here. It wouldn't be consistent with the fact in all these earlier years they were calling themselves partners and they were working together with the bank as partners. That shows you the genuineness of the defense if nothing else, because there's actual data that reflects the partnership prior to this indictment. And I would also suggest to Your Honor that really, in my view, this would be -- should be enough. But this is only one of many factors. And I'm go to proceed. But I want too make sure the Court understands the intent of the parties.

Another one, another statement from the Provident Bank records, "Mr.'s Stollof, Nusbaum, Berman will join forces this year as they have done in the past for purchase of liens in Baltimore City and will join forces in Prince George's County." Another statement. This is from another document, all the years, because they spread the indictments from 2002 to 2007, each of these years the Provident Bank records -- so you can see, perhaps I'm getting ahead of myself, but why we wanted some subpoenas from other banks to find more helpful information. But

that's for a different argument.

As you can see here, or as I'll read to you, "Mr.'s Stollof, Nusbaum, Berman will join forces this year, as they've done in the past, for the purchase of liens in Baltimore City." A lawyer, who's name I will not mention, but is in this document, who represented the bank from time to time, he knew that Nusbaum, Stollof and Berman all shared information on tax liens before the auctions.

As you know, the government has a number of witnesses as is traditional. One of the defendants, Mr. Steve Berman, who entered a plea, I predict, and I proffer, and I have back up for this, would acknowledge that -- the aspects of the relationship between the parties. He will even state, I predict and I proffer, and I have back up for and it's in this book, that there was a partnership between the parties. Now, I know that when you hear his testimony, it's going to be very difficult for me now to bring all this out, but I will. I will if I have the opportunity.

Now his -- in fairness, the statement I had doesn't say we were partners in every aspect of all these liens, but he acknowledges that he had gone into partnership with Stollof and Nusbaum and in one particular auction in 2005 in Baltimore City. And it's in the -- and I've given you the 302 to look at. And after all, I mean, I'm not able to meet with him, I'm having a very difficult time even

going this way to show facts, but I can -- I'm going to show you some more.

But I want to make a comment which you may find surprising, but nevertheless I feel that I really do want to credit the integrity of the prosecutors in this case. I do not feel that I would have been able to garner all of these favorable facts had they not presented me recently with some information that I still, you know, I filed under my motion. And I wanted to make it clear that this is a very hotly contested case, but it's not a hotly contested case in terms of the lawyers trying to work together, which is why we met and crafted that letter for you trying to move this along. But I do have that evidence. I proffer it. I say it on the record.

I say that I have -- I can show intention to be a partner. I can show you that bankers and public people knew that they were partners and teaming together. And by the way a teaming agreement under the law is a joint venture partnership. And under the antitrust law, I respectfully request you to consider, that you do not have to have a joint venture to qualify as a single unit entity. It could be collaborating. It could be teaming, it's called a joint venture. I'm calling it a joint venture because to me that's how it appears to me.

And I'm calling in a expert that tells me it is a

joint venture. I'm going to call, if you let me, an expert economist who's going to take you and the jury through this to see how, no pun intended, silly the government's case is against these defendants. So I have this proffer about the -- Mr. Berman who would acknowledge. And I will -- I read it to you, and I have the back up for you.

I also want to share with you now some of the ingredients that are important to consider in terms of facts that I can show to the jury. And I ask you to give this the best light of the defendant at this juncture, months before trial, in an unprecedented setting where I have to give almost my opening statement for the Government. And you can see they're interested because they're taking copious notes.

THE COURT: I suspect they might even order the transcript.

MR. SANDLER: So I've covered the intentions of the parties. I've covered how I think the testimony will show this. And I want to talk about now some of the other ingredients which I think will reflect on the antitrust facts of this, namely the core efficiencies, economic efficiencies of how it was productively wise for these individuals to team up, and how it flowed to the benefit of the market.

First, one of the crucial --

THE COURT: Okay. I just want to make sure that

-- and I don't ask this to be argumentative, I'm just -- the facts as proffered, as I understand what they are, is the intention of the parties entering into some kind of agreement, joint venture or teaming. The belief that they, in their minds, that they were procompetitive. And the fact that this partnership was known to a third party, the bank. That is what your proffer of the single entity is, before we get into whether it's procompetitive.

MR. SANDLER: No, that's part of it. I have more.

THE COURT: I'm sorry, I thought you were --

MR. SANDLER: They overlap. You left out also that one of the witnesses, that's a government witness, will acknowledge partnership.

THE COURT: No, no, as I say, there's an intent to have a partnership or joint venture or single entity. The belief among the people who are partners, that it is procompetitive, and the fact that this partnership was openly disclosed and known to a third party.

MR. SANDLER: And the belief of the banker that it was too, yes.

Now, the other aspects would be as follows, and I have to suggest to you that the parties also -- this is a little summary of what I'm going to talk about next, but before I do that, I'd like to emphasize that the parties also, to satisfy some of the elements of traditional

partnership or joint venture, shared the profits. They divided equally the liens. And I have some examples in the tab where they do that. Where, in other words, what happened is sometime -- the concept was, of this joint venture, was to pull your resources together, share a lot of information and due diligence, work hard to, in terms of due diligence, carefully analyze and examine the various properties that were available. Had 40,000 liens, it was very complicated. And there was a very arduous task to know what to bid and what not to bid on. They would share that information. And then at the end -- and they would divide up the liens, but they would always make sure, at partners do, that they divided up the liens evenly. There are documents here which I can show you where, for example, Mr. Berman's writing to the attorney, say, for Mr. Stollof, reporting in on his share of liens. In some instances, for example, in Montgomery County where they bid, Mr. Berman got nothing, and Mr. Stollof and Nusbaum would true up and give him his 50 percent, and vice versa. I have that documented here.

THE COURT: This is so counter-intuitive, though, since the whole purpose of the bidding, whether it was an auction or sealed bids or whatever, was precisely to prevent this kind of sharing. It just is absolutely counter-intuitive. I mean the whole purpose of having an

auction or competitive bidding, either sealed or unsealed, is to prevent competitors from getting together to share exactly and divide up the profits.

MR. SANDLER: No, that's not accurate, Your Honor. Many of the partnerships and organizations are in bid rigging traditionally all over the country. In fact, Mr. Nusbaum and Stollof were partners for years just among themselves doing similar --

THE COURT: Were they telling the counties they were doing it?

MR. SANDLER: Yes.

THE COURT: Of course, that's what we get to later, another motion.

MR. SANDLER: Yes, but that's part of all -- yes, the answer is yes.

Now, in order to -- in order to go forward with this, I would ask you to examine whether minimally sufficient facts come forth where I can show that there was a legitimate joint venture. Then the next question is, can I show minimally that it meets the antitrust guidelines in terms of what is an economic efficiency. And the reason it's not counter-intuitive is this way, first of all, if in this tab -- book, there's a tab 14, which shows the business plan. And I didn't give you the book because I'm going to enter it into evidence if you let me. But I relate as a

proffer five or six pages from the report of Mr. Priest, that hopefully will be forthcoming. And what he goes into are all the issues of why, from an antitrust point of view, this is perfectly appropriate.

And I would like to, because we're in open court, I would like you to take a moment and read what I give you. And I'd like to give it to the government so that I don't have to show it on the screen.

THE COURT: Okay.

MR. SANDLER: Is that acceptable?

THE COURT: That's fine. But nobody in the back can see the screen any way.

MR. SANDLER: Well, I know reporters -- I'm just trying to do what --

THE COURT: No, no, I just think as a practical matter there's no screen. I mean, at some point --

MR. SANDLER: Okay. Before I put it up on the screen let me say to you as follows, in the other aspect of this venture is the sharing of information. And the information that's shared is very crucial. It's in-depth analysis of what properties are susceptible to these liens. And the individuals would draw upon one another. Mr. Berman would testify that he needed Mr. Stollof's input. He was an expert at this. And they would categorize the properties as to desirable or not desirable, who owned, whether they were

owned by banks, whether they were owned by corporations, whether they had a history of paying up quickly, not paying up. That type of information, the location, the locale, all of that was crucial information.

They also shared expenses of corporate -- of software programs, which is resources they pulled together because the software programs with a -- contained the strategy and the way that they could prepare their bid books and how they would analyze the properties. And I'm going to move on quickly because I don't want to overstay my welcome, but that's another important point. In addition to sharing the due diligence and sharing computer equipment, they also shared messengers, they shared the profits, as I told you.

And they have also the crucial point which going to your counter-intuitive issue, they had the advantage -- and here's where part of the procompetitive impact comes -- they had the advantage of what I call cross financing. In these tax liens, auctions, if a bidder overbid and didn't have the funds on the spot, he or she, particularly with a high bid premium, he or she would lose everything. And when they had the cross financing opportunity they each could bid more. They each could bid more quickly without being concerned, taking advantage of each other's opportunities to insulate each other from the overbidding, as you will see from some of the examples in the book.

So as a result of that, when they were not bidding with each other, there was less competition in the market, which I will demonstrate through an expert who will do a market analysis and present it. So I express to you a proffer of some of the facts that I would produce before a jury in terms of the defense that this is a valid joint venture. I haven't gone to the antitrust issues.

But I would be able to show intention. I would be able to show recognition. I would show they acted like partners. I would show they had proprietary interest in joint ownership of computer programs and hardware. I would show they had fiduciary duties to each other with regard to what they were doing. I would show also that they had shared a computer consultant who was crucial. And I would also show you that they shared the profits.

And that they shared what I would call the financing, cross financing. They couldn't get joint financing because no bank would loan to all of them for reasons of bank needs of priority. But as you can see in the example I gave you, one bank would help out the other if need be. So those are the proffered facts for a joint venture.

Now, as skeptical as you could be, I respectfully request that still sufficient if you look at it in the best light of the defendant to go forward. Now, the jury may

take your approach it's ridiculous. You may feel at the end of the day I didn't produce all of the testimony and therefore deny me a jury instruction. That has to -- we have to wait and see. I would have preferred just to try my case, let go -- and put in my evidence and without having this, but the government properly wants to nip their -- nip it in the bud, I'll put it that way, which I don't think is fair, because the truth should come out. And the jury should have a chance to evaluate. This is what they thought they were doing. This is what they did. And it wasn't a cook book defense. You can see this through all the other -- the proffer points that I mentioned. Because this was happening as it was going on.

Now, in terms of other characteristics, just to make it clear, so I haven't missed anything, I put up here the intention of the members of the joint venture as corroborated by testimony of witnesses and bank documents. Intense due diligence and shared personal knowledge and information obtained from due diligence, and collective experience relating to tax sales and real estate markets. The joint venture developed proprietary computer programs and software to organize and analyze publicly available -- publicly available tax sale auction data and other relevant bidding information.

The joint venture shared a common computer expert.

The joint venture purchased equipment and services that enhanced bidding efficiency. The joint venture shared messenger services when necessary for delivering sealed bids and other communications to auctions. The joint venture pooled their financial resources and assets together in order to bid on more liens while continuing to submit competitive bids. Remember it's the high bid that wins. And there are thousands of people that can come in and bid. The joint venture did not submit bids under one entity because of restrictive covenants places on the members of the joint venture by the separate lenders. The joint venture randomly divided the liens offered that they intended to bid upon and redistributed the acquired liens to reflect a 50/50 ownership.

THE COURT: Let me understand, let's see that --

MR. SANDLER: I beg your pardon?

THE COURT: The one before that, joint venture did not submit bids under one entity because of the restrictive covenants placed on the members of the joint --

MR. SANDLER: That's a mistake, it was under one financing entity. I left the word financing out. In other words, what happened was the banks could not -- the banks would not, testimony would be, lend the joint venture $40 million, because the banks wanted to make sure that they had an opportunity to place first position on their client's

lien, on their client's money. That is -- so what they did is they just pool -- they pooled together.

Now, that's the facts the way they are in terms of how it emerged. They -- because of the cross financing it was one of their ways that they could bid more because they didn't have to be worried, no one would want to go to an auction and risk overbidding. Now, you say, why would someone overbid and the answer is because if you bid -- let's say you bid on a hundred liens, you wouldn't have a hundred liens because many of them are paid up on the spot and many of them are quickly eliminated. So you don't have enough liens for your day. So you would calculate bidding maybe up to your limit of financing or a little more. And sometimes you would miss -- you could miscalculate. But when you have the other opportunity of what I call the cross financing, where the parties could true up, you didn't have that problem. And it led -- you'll hear testimony, led to even more competition.

THE COURT: I just don't understand, if it was really a single entity or a joint venture, why didn't they get lending from the financial institutions for the joint venture? It's a simple question, but it's confusing to me. If in fact there was an entity, everybody knew about it, why wasn't the bank's customer the joint entity?

MR. SANDLER: Because the bank wanted to have

individual names on their record for primary collection. They did not want to have --

THE COURT: That doesn't make any sense. I mean, any partnership you can get guarantees, you've got the partners -- under partnership law they're liable. I don't get it.

MR. SANDLER: Well, the issue is the first lien would be on the individual, not on the collective entity. That's the way Provident Bank wanted it. We'll have testimony to that effect. But, you know, when you say that there is a troublesome point, I don't find it particularly troublesome.

THE COURT: No, I'm -- not troublesome, I'm just confused. I don't understand if there's a single entity, why wouldn't Provident loan money to the single entity. And then -- and we're talking now not liens against the property, we're talking about liens against the property of the partners, the members of the joint venture. I don't understand why if there was a single entity why a lending institution wouldn't -- and everybody was acknowledging this to be a joint venture, why they didn't lend to the joint venture and have the lien against the assets of the joint venture.

MR. SANDLER: Because, for several reasons. First of all the bank, the Provident Bank was the bank that

traditionally had loaned money to the Stollof and Nusbaum group, and they wanted a first lien on those liens. The Berman group had family funds. And the arrangement with their banking was totally different. And the bank had a limit on how much they would lend on -- in terms of their total loan. If they did it separately they could acquire more funding, but that is -- that's the answer I have. And that's a question that will have --

THE COURT: I don't get it. It would seem like in the Supreme Court case, and whatever that joint venture would have made its loans from the financial institution. If it really is a single entity, it would seem to me that it gets its financing as a single entity. I mean, that just seems to me an objective hallmark, if they're not, they're in the a single entity.

MR. SANDLER: So what you're saying to me, if they don't have financing from one bank that means they're not a joint venture? I mean, that's what you're saying.

THE COURT: No, no, it's just the indicia you're talking about, I don't understand. They're still -- they're getting separate financing in their separate capacities and yet they're a joint venture.

MR. SANDLER: Yeah. Yes, Your Honor, because of the nature of the tax liens, the nature of the limits that could be given. If they -- if the bank would -- if one

bank, Provident, would give the loan to the joint venture collectively it would be limited, say, $20 million. And if the join together they had other banking for significant amounts so they would have more money at their resources to buy --

THE COURT: They could go to another bank if they need more financing.

MR. SANDLER: Well, I don't know. That's fact that may or may not be of interest, but I don't think that's a dispositive issue.

THE COURT: No, no, the question is whether they're a joint venture.

MR. SANDLER: I'm suggesting to you --

THE COURT: Or single entity.

MR. SANDLER: Excuse me, I want to back up a second, the question for the jury is whether they're a joint venture.

THE COURT: Well, yes and no. The mere fact that there may be factual disputes, I mean, the issue is of public policy in antitrust law, which that's exactly why I have to make a probing analysis before I decide even if there may be a factual dispute, what's a factual dispute as opposed to a issue of law.

MR. SANDLER: I would say this to you, it's clear to me that that is an issue that's on your mind. And I

would be happy to submit a supplemental memorandum.

THE COURT: No, no, keep going, I'm just trying to understand.

MR. SANDLER: It's my understanding that the reason there wasn't one massive loan to the entity is because the borrowing patterns of the individuals historically were with their own lending institutions for Nusbaum and Stollof and family for Mr. Berman. It is my understanding that Provident Bank would not let a joint -- would not go to the entity because they wanted to have a first lien on their client's lien, the one that he bid on. And that's how they kept track.

THE COURT: The one they dealt with historically.

MR. SANDLER: That's correct. That's the answer that I have. And I don't --

THE COURT: That's fine.

MR. SANDLER: Okay. I also wanted to say that they randomly divided the liens, offered on a 50/50 basis. Each group shared control of the venture, including the bidding at the tax lien auctions. And then I wanted to lead into the economic efficiencies that these groups developed were a direct result of the competitive market. And the efficiencies developed allowed members of the joint venture to out bid others for liens they may not have been able to bid upon. And I'm going to talk about these efficiencies,

because I'd like to share with you in terms of the antitrust issues some of the writing of the expert. And I really -- I can put it on the screen and let you read through it or I could hand it up and give it to everyone.

THE COURT: Which ever you prefer.

MR. SANDLER: I prefer to hand it up. I think it's better. Bear with me one second, Your Honor.

MS. GALLAGHER: Your Honor, would it be okay if we take a brief bathroom break while everyone's --

THE COURT: Sure let's do that. I'll read and let me know, one of you let me know when they're ready.

(A recess was taken.)

THE COURT: Okay. Timely recess, I could read the materials. Thank you very much, Mr. Sandler.

MR. SANDLER: Thank you, Your Honor. I'm coming to a close and I wanted to thank you for your patience.

THE COURT: It's my job.

MR. SANDLER: But if I may go back to one of your questions about the troublesome question -- or your confusion on the banking, I would proffer some further facts that might help. I understand that based upon thinking about the matter, further learning more information, that essentially the banking situation was very complicated for a number of reasons. The banks would only loan a certain amount, which was $20 million. That when they had two banks

lending each came with $20 million, so it was $40 million.

In addition to that, the collateral was different and the term of loans were quite different. The Nusbaum group would borrow against the liens and there was a lock box arrangement. Whereas the Berman's group borrowing was not based that way at all. They had their own connections, their own interest rates which were lower or different, and that they borrowed against real estate collateral, that I understand was totally separate. And that explains the financing. And in addition to that, I've asked you to read part of a proffer of Professor Priest.

I also have three more points to bring to your attention by way of proffer. I wanted to summarize what we believe the economic efficiencies were of this joint venture, which you'll find in the -- when we hand in the proffer notebook. But the collaboration increased the available information concerning those liens that might possibly be profitable, increasing the dollar magnitude of bids on those tax liens, and increasing the number of tax liens which the joint venture submitted bids. And there's a two-page summary, which I thought to bring to you while you were in conference, but in take talking to counsel we thought best to do it in open court.

THE COURT: All right.

MR. SANDERS: But I have, for example, a summary

of the efficiencies that we've talked about. I'd like to show you that. I'd like to read to you a paragraph of a proffer of the testimony of Professor Booth and then show you two examples of partnering. And then I would conclude. If you could read the market efficiencies.

THE COURT: Okay.

MR. SANDLER: This was the next part of it.

THE COURT: Okay.

MR. SANDLER: Now, you see, I respectfully suggest, you really can't proceed with a single entity defense in an antitrust cases if all you're going to show is you had a joint venture. The joint venture has to have certain market impacts and certain efficiencies of economy, which we will prove.

I'd like to share with you Professor Booth's comment. It's pages which I put in the proffer book, but in summary.

THE COURT: Okay.

MR. SANDLER: There were occasions, I proffer, when the joint venture members would in some instances only one would bid for all of them, then they would divide, then sometimes they would bid separately and divide.

I would also now conclude by stating as follows: If I must, and I would determine that at trial, I would call my client, Harvey Nusbaum, who would testify under oath as

to the nature of his relationship with Mr. Berman, business relationship, as to all of the elements that would constitute the venture as I indicated, and underscore, corroborate it, and testifying about the economic efficiencies. He's not an economist. He's not going to talk in legal terms. But he will tell the jury exactly what they did, how they did it, how they met, why they met, what their goals were, what his intention were in terms of expanding his opportunity and joining forces, and the benefit of that.

So I conclude as follows: It's not necessarily a typical case. It's not necessarily every day that you see so many lawyers in this type of case at this stage of a proceeding, when it's not a drug case or some other large public type of matter. The issues are not necessarily frivolous. It's not something that has been contrived just to try to pull something off. It's a defense based on the facts and the law. And what's so daunting to me, Your Honor, is that we're at such a preliminary stage, we're not arguing a case now to a jury. We're suggesting to you as a criminal defendant in this state, in this country, there's a defense that he would like to interpose.

If a fact finder thinks it's ridiculous, they will scold him for it. If the fact finder thinks it's applicable, it's not, as the Justice Department said, a jury

nullification. I had one little article, I'm sorry I wrote it now, I never thought it would appear in legal pleadings, but nevertheless it wasn't geared to nullification, it was an academic article for something totally different. So what I'm saying to you is, at this stage of the case, please give every benefit of these facts the best light of the defendant so we can prove our defense if we must, interpose what we must.

And I suggested to you in my writing that this is not an affirmative defense. The government has the burden of proving that it's not a joint venture or single entity. The case law makes that clear. And I cited that Jack Russell Terrier case. I mean, that's clear. So I'm not trying to be an alchemist. And I suggest to you that as my investigation of the case continues I'll uncover even more facts to corroborate these issues.

And I would ask you, if there is a doubt, let me come back one more time with my experts. If I must, I'll give the state free discovery. I'll bring them here. And they can give you and explain to you their opinions as academics and individuals with skilled knowledge in these areas, to tell you not the fact that they have the ultimate say, but that are entitled to testify as to the ultimate issues. Although, I'm not -- I would just ask them legally permissible questions, which they can then ferret these

facts and explain to you why, in their opinion, this case is not a bid rigging case.

And of course it's easy for the Government to say we recognize that when we put these facts in evidence, if you think about it, and I was kidding counsel during the recess, I saw them smiling at some of my comments, because of course some of the facts that we're going to prove will enhance their own case, it's obvious. But we're not cowards veering from the truth, we're going to tell -- we want the jury to hear exactly what happened, so a fair trial can exist.

And, Your Honor, I don't say this at all without the greatest respect, but in my years of trying cases, very similar age we are, we've known each other a long time, I'm senior status, and I haven't -- I've tried criminal cases with much less than this in terms of facts, much less, and have been able to proceed. And if my client were wrong, the good jury told them so. So please let me go to the jury to defend my client --

THE COURT: As I understand your position, the case never goes to the jury because they can't prove beyond a reasonable doubt that it's not a joint venture.

MR. SANDLER: Well, I'm not sure that's correct. I think it would go to the jury, because I think it would go to the jury on the issue of -- I would get to defend --

first of all, in the *Ricks* case and the *Romer* case, I mean the 4th Circuit recognizes this --

THE COURT: No, I was just trying to follow the logic of your argument. They've got the burden of proof, and you're going to establish all this in your case, I don't see how it ever goes to the jury.

MR. SANDLER: Well, maybe that would be a fact, that would be up for you to decide. I don't think it goes that way, because I think that even under your thinking it's questionable. I mean, they have the right to stand up and say it's a sham. They have the right to say it's I silly. And they have a right to give their argument as to facts. But if you believe that the law says a valid -- if you say to me, Mr. Sandler -- if you say to me Mr. Sandler the predicate on which you operate is invalid, I do not accept under any circumstances that if you have the Holy Ghost of joint ventures before me, you still can't put on a defense because it's not acceptable law. Then I have to bow down and wait for --

THE COURT: And appeal.

MR. SANDLER: Pardon?

THE COURT: May have to bow down and appeal.

MR. SANDLER: Well, then I drive down to Richmond and I see another Judge Motz. But any way, my point is that if you believe the major premise is valid, then the question

of whether the minor premises is valid is debatable fairly --

THE COURT: Okay. I understand your position. I want to make clear, the only thing that I -- I mean, you've made a much more -- I think it was important to have a much more detailed factual -- some kind of factual proffer today, because I had absolutely no idea from the papers what it was you were relying on. So let me hear from Ms. McMillen.

MS. McMILLEN: Your Honor, John Terzaken will be arguing for the United States.

MR. SANDLER: Before you hear from the government I just object -- may I just put a objection on the record?

THE COURT: Sure.

MR. SANDLER: I would like to object to the government's comment on the proffer, because at this stage the government's argument against the proffer should not be considered. That's the objection. I know it's overruled.

THE COURT: It's overruled. I believe in the adversary process.

MR. SANDLER: And finally, Your Honor, at what point may I introduce the proffer book?

THE COURT: Right now.

MR. SANDLER: Thank you.

THE COURT: And I gather it's going to be Mr. Terzaken.

MR. TERZAKEN: Yes, Your Honor. Good morning, Your Honor, feels like afternoon already. The United States doesn't disavow the single entity theory, just to make that clear for the record. What we agree with the Court on is that the application of that particular defense in this case would turn the antitrust laws on its head. And it would turn the antitrust laws on its head because, as a factual predicate to any single entity defense, there has to be a showing of a formal pre-existing business relationship between the defendants and all of their alleged co-conspirators. Every single case --

THE COURT: Does it have to be in writing?

MR. TERZAKEN: It doesn't have to be in writing. There has to be a demonstration that there was a formal agreement. In every single case. Take the *Romer* case for example, there was a formal partnership. The *Copperweld* case, a parent and subsidiary. The *American Needle* case, a franchise case. Every single case where the single entity defense has ever been considered, or in fact proffered, has been a circumstance in which a pre-existing formal business relationship existed.

The reason why is because the single entity defense really isn't asking the question about whether the formal business relationship existed. It's a question of whether or not all of the parties to that pre-existing

relationship were so integrated in their conduct that they therefore should be considered under the law to be one entity. Those are really two separate questions. The problem here is we never even get to the single entity defense because there is no showing, and can be no showing, by these defendants that all of the alleged co-conspirators in this case were part of a joint venture or partnership, whatever label they choose to put on it.

The formal business relationships that have been demonstrated in the cases I mentioned were either in corporate form, in written agreements, or in unchallenged oral agreements, where firm partnerships were represented to other parties. None of those facts exist here. Every fact that's been proffered today is equally consistent with a well-oiled conspiracy as it is with the existence of anything else. And in fact, to clear up any confusion, a number of the facts suggest exactly the contrary to what they've been representing.

For example, to clear up the Court's confusion about why these banks didn't lend money to a single entity, because there is no single entity here. We've never once heard the name of this joint venture, where its headquarters are, what its joint bank account number is. The reason why is because there is none. These are two competitors who sat down with the bank trying to get more money. There is no

single -- to clear up the confusion about why they didn't submit joint bids as a single entity, they never represented themselves as a single entity in submitting those bids. They submitted those bids as separate independent competitors.

Where on the face of that evidence is there any suggestion of a formal business relationship? Instead what the defendants want to do here is call an expert -- who I would put on the record is unqualified yet to testify as an expert in this case -- to suggest that looking at all of these market factors we can assess, after the fact, that this well-oiled conspiracy really could constitute something else, maybe we should call it a joint venture instead. And that's where the antitrust laws get turned on their head.

If this was the defense in every antitrust case we would hear this exact defense every time. And in fact the per se rule would no longer exist, in fact bid rigging crimes would no longer exist. The fact that competitors get together and agree, and they do it very well, and it's profitable to them, is exactly why bid rigging is condemned. Because what we're trying to promote here is competition. These folks holding themselves out as independent competitors should be competing not collaborating behind the scenes. It's exactly what the antitrust laws are meant to prevent.

So the issue seized here, I think the court has seized on as the appropriate one is really focused on this factual predicate. We can argue at a later time about the efficiencies created, or whether or not there was any integration of other things, use of other people, for example, to help facilitate the conspiracy. All of those things are for a later question. The critical question here is the defendant --

THE COURT: When do they become material?

MR. TERZAKEN: They don't become material until they establish a factual predicate that a formal business relationship existed. Again, there is no defense here unless a formal business relationship existed. And then the question where experts and testimony about bank accounts and use of people to facilitate their activities, that's when that becomes important. Because then the question is, is this joint venture, if there was such a joint venture, are all of those parties then so integrated that they really were one entity, and therefore, couldn't conspire with each other.

Because there's still also the possibility that they can't even meet that second threshold, that is they weren't that integrated and they were simply using the cover of a joint venture as a sham. And this is the law that's very clearly stated in *Palmer* and *Engine Specialties* and

Addamax, none of which, contrary to suggestions of the defendants in their papers, has been contradicted by *Dagher* or any of the recent Supreme Court cases. It's still the prevailing law.

The issue here is that the defendants, regardless of some of the evidence that they've put forward today, or facts that they have proffered, cannot under any circumstances plausibly demonstrate the factual predicate of a formal business relationship between all of the parties alleged as co-conspirators here. The United States knows this and so do the defendants. We've produced full discovery to them, including all of the 302s of all of the co-conspirators. They also have in their hands the plea agreement of one of those co-conspirators, a co-conspirator who appeared before this court and admitted to rigging bids with these defendants.

MR. SANDLER: Objection.

THE COURT: Overruled. Whatever --

MR. SANDLER: Just for the record.

THE COURT: Fine.

MR. TERZAKEN: He appeared before this Court, in his factual proffer admitted to rigging bids with these exact defendants on these auctions. Now defense counsel might suggest they can score a few points on cross-examination to try to suggest they can lure out of him

that there were parts about the way they contrived this conspiracy that look like a partnership. But what they can't do is controvert the fact that this individual has admitted before this Court, and I suspect very well would admit on the stand, that he conspired with these individuals to rig bids. This wasn't any partnership or any joint venture. It was a bid rigging conspiracy.

They're also equally aware of the other co-conspirators alleged in this case, John Rieff, Jay Dackman, they're in possession of their 302s. And in those 302s those very same co-conspirators admit to the bid rigging conspiracy with these defendants. They cannot over come that. If all of the defendants to this alleged joint venture didn't participate in it, and instead are admitting to rigging bids, how can a joint venture or formal business relationship ever have existed. It's nonsensical.

Going even further, I found it incredibly interesting that it was proffered that Defendant Nusbaum himself might a take the stand to suggest there was no bid rigging agreement, because the United States had an opportunity to interview Mr. Nusbaum on multiple occasions.

MR. SANDLER: Objection. May we approach the bench?

THE COURT: No, let's not go there right now.

MR. TERZAKEN: Without getting into the facts

behind it, I think the Court is well aware that the United States has firm evidence that any such testimony would be highly questionable from the defendant.

On the facts before the Court, that is what has been proffered by the defendant, there is simply no factual basis for them to proceed on the single entity defense.

THE COURT: What do you understand does -- what do you understand Mr. Sandler to have said is the indicia of the single entity.

MR. TERZAKEN: What I think Mr. Sandler has said is the defendants want to say now, after the fact, that they acted very efficiently with their co-conspirators in rigging these bids. And then he would like to call an expert to get on the stand and say, well, any bid rigging conspiracy is very efficient.

THE COURT: But I ask you because I'm not sure I understand, I'll ask him again myself, but it's that they agreed with one another to divide up the work. That can't be it, because every bid rigging is a single entity, that's silly.

MR. TERZAKEN: And I said from --

THE COURT: Secondly, that they did it because they thought it was procompetitive. That seems to me to absolutely underline, as a matter of law, the per se rule. I mean, you can't -- just because somebody thinks something

is procompetitive you don't get to go to the jury essentially just to determine if something is procompetitive. That's what the pro se rule is all about. You can't defend on that basis. Thirdly is because they somehow -- they hired a single computer expert and they pooled their resources to engage in this. And fifth that what they were doing, their teaming arrangement was known to Provident Bank. Did you understand him to say anything else?

MR. TERZAKEN: No, I didn't. And in fact --

THE COURT: Mr. Sandler, is there any other indicia that this is a joint venture?

MR. SANDLER: Yes, Your Honor, all that I covered and all that's in that book.

THE COURT: But instead of --

MR. SANDLER: I'll summarize --

THE COURT: Let me see the forest for the trees in this.

MR. SANDLER: I said to you as follows, that the parties intended to be -- the proffer, the parties intended a joint venture. The parties shared that information openly. The parties shared resources and due diligence, which was a crucial fundamental aspect. They shared that work, they pooled that together. They met and they analyzed the research. They decided what they wanted to do, what

they didn't want to do. In addition to that, they shared expenses of computer consultants. They shared expenses of hardware and software to support their work. They shared the advantage of what I call the cross financing. In addition to that, they divided equally the profits. I also said to you that there's an expert in Maryland law, and under Maryland --

THE COURT: Okay. I understand. Okay. You've given me the facts. That's what I understood. Go ahead.

MR. TERZAKEN: And that's the same as the United States understood. And, again, all of those facts, if taken as true to defendant, which we would contradict some of those facts, still don't amount to demonstrating a formal business relationship, a pre-existing formal business relationship between these defendants. For all the reasons that the Court has --

THE COURT: The one thing, I'm not sure that it goes to single entity, tell me about as far as the bank who knew all about the teaming arrangement. That does seem to be at least they weren't hiding it from them.

MR. TERZAKEN: Well, I'm glad to bring that up, because in terms of clearing up the confusion here, again, I think the Court's questions on this were exactly on point, and that is if there was a single entity here, the bank would have funded the single entity. It is not an

explanation simply that these different competitors got money from different banks and held themselves out in meetings that we might partner up with these other individuals during the process.

What due diligence was the bank doing to check into that partnership? None. Merely this was a suggestion to the bank as to how this money was going to be used and how they were going to be using it later. The bank wasn't vetting, as was suggested, the existence of a partnership. They didn't need to because they weren't funding that entity. And if that entity really did exist, it would have been funded by the bank.

And, furthermore, it would have used those funds as a single entity in those auctions. The most critical question asked by the Court and admitted to by the defendants in their summary of bullet points, they listed out and the Court seized on, was the fact that this these supposed joint venture partners held themselves out as independent competitors and bid separately during the auctions where they were supposed to be competing.

THE COURT: We'll come back to that because that relates to another motion, but again, I'm not sure it goes to whether there's a single entity, but I gather it's your witness because you produced the 302. The fellow from the bank, and it was reviewed by him and by presumably bank loan

officers and maybe the board. Why wasn't -- I'm not sure it cuts, I don't quite understand why it didn't stand out as a red flag to Provident that this was illegal bid rigging.

MR. TERZAKEN: Well, the statements they're referring to, coming out of certain of the bank papers and the 302, was the description from this individual of the information that was relayed to him, or representations that were made during the course of the discussion. Ultimately though, the funding was for the specific individual competitors, not for any partnership. So to the extent that he put a word like "partnership" or "teamed up," or otherwise described it in a way that he didn't believe it was criminal conduct, does not prove the existence of any formal business relationship, when there is no other indicia of the fact this formal business relationship ever existed.

THE COURT: You know, maybe the simple way, I guess even if he did -- even if he did think it was illegal, so what? If you accept that the fact of the disclosure -- the fact of disclosure to a third party of exactly what was going on could be deemed an indicium that the parties to the agreement considered to be a legitimate partnership. It could be because you don't go around disclosing to third parties things which you think to be illegal.

MR. TERZAKEN: One other -- I guess one other point to consider is, in that particular disclosure we're

not talking about the breadth of all the co-conspirators who are alleged to have participated here. I mean, that covers Steve Berman. And take what you will from that disclosure. And I think it will be well-proven before the Court that that particular discussion has no bearing on whether or not there was a formal business relationship here.

But where is the discussion about John Rieff and his company. Where is the discussion about Jay Dackman and his company, and others, there is none. Those individuals stand out there as independent co-conspirators even beyond Steven Berman, who's pled guilty in this case. All of whom say there was no joint venture, no partnership, have admitted to the bid rigging count. And are going to testify to that at this trial.

I mean the issue that we have here boils really down to the confusion that this issue is going to lend to this jury. This is, as the Court knows, a run of the mill bid rigging case. It is a straight forward conspiracy among these defendants, and multiple of their other competitors to sit down in advance of auctions, out cry and otherwise, to predetermine who the winner of that is going to be. And they did that holding themselves out as independent competitors.

THE COURT: That's leads to -- I realize we're -- but we are going to run out of time. There's a motion, I

forget which one it is, but I think it's by you all in limine to keep out statements that were made prior to a certain time the change of the law, or something of that nature. It goes to the question of whether the public municipalities or counties knew what was going on. So could you flesh that out for me a little bit.

MR. TERZAKEN: Sure. Just to clarify for the Court, what we're talking about there is the indictment charges 2002 forward. And the auctions that we're talking about that we've moved to preclude those statements's are from the auctions prior to 2002. And the reason why is those auctions were conducted under far different rules than the actual auctions that are the subject of the indictment. The reason why is because the law changed.

And the law changed for exactly the reasons that Mr. Sandler discussed with you. That is, prior to that time period, the tax lien's auctions were set up in a way that allowed bidders to bid infinity. That is because it goes to the highest bidder, they'll say I'll bid to the sky's limit just to win that tax lien. And that wasn't helpful to the auctions, to the state, the municipalities who were putting on these auctions because they couldn't determine the winner of the bid. So in those circumstances where everyone bid infinity, there were circumstances in which, at least allegedly, there were discussions about, well, we've got to

figure out who the winner here is, so let's pick a winner. And maybe there were discussions that occurred in that context.

The law was specifically changed to encourage competition prior to the charging period in the indictment. Where the law was passed that that infinity rule no longer applied. This is where you get into the high bid premium and the formulas that Mr. Sandler was talking about. So with respect to any of this condoning, if you will, of this behavior, that is all preindictment period under far different circumstances than the auctions post-indictment period were conducted.

THE COURT: So you're aware that no evidence of condoning the activity after the change in the law.

MR. TERZAKEN: That's correct.

THE COURT: And your position is even if it were condoned it would be irrelevant?

MR. TERZAKEN: That's correct.

THE COURT: Okay.

MR. TERZAKEN: Your Honor, this is also some --

THE COURT: Except if there was condoning it would cut into at least the atmospheric argument, look, these people were holding themselves out to be competitors, when in fact they weren't, if in fact it was evidence of condonation, to some extent that atmosphere is undermined.

MR. TERZAKEN: That's true. Although, again, the argument here is notwithstanding what statements they may have ultimately made, those statements are irrelevant as to whether or not these individuals reached an agreement to rig those particular auctions. I mean, at base, as the Court well understands and has understood early in these discussions, this is a per se case. The intent, the crime itself, everything gets wrapped into whether or not an agreement was reached between these defendants in advance of these auctions to predetermine the outcome of them. Because they should have been independently competing. That's what the issue is here.

And now what they want to infuse into this case is this broad label. And you see it already in the paper that they're submitting to the Court. Right away the expert calls this a joint venture, right. That's the label we've put on it. And it's only a joint venture after the fact as contrived by that expert through a number of logical steps and other things.

THE COURT: Well, I would assume every bid rigging is a joint venture.

MR TERZAKEN: Well, it sure is. It's a very excellent, well-oiled collaboration among competitors that has an anticompetitive effect. A partnership in crime my colleague mentions.

THE COURT: Exactly.

MR. TERZAKEN: Which is exactly correct. But we return, I think, to the very point the Court started with, and I think exactly identifies the issue here, and that is, were the Court to accept and allow this defense to go forward, the Court would essentially be turning the antitrust laws on its head. It would open the door for every single partnership in crime, every conspiracy, to come in and say, well, we were working together very well, jury you should not find us guilty because we were so efficient in what we did. That would eviscerate the meaning of the antitrust laws and their impact on the economy.

Your Honor, there are additional points that were --

THE COURT: It would make John D. Rockefeller a very happy man.

MR. TERZAKEN: What's that?

THE COURT: It would make John D. Rockefeller a very happy man, or maybe Bill Gates.

MR. TERZAKEN: Certainly wouldn't be good for my employment.

The other issues that the defendants have raised in their papers, and I don't know how far the Court wants to go into these, because the defendant hasn't raised these per se, but that is they've alternatively argued that even if

this single entity defense is foreclosed by the Court, that they should be allowed to bring in this evidence for purposes of negating the defendants' intent, which the case law doesn't support. There isn't a single case cited by the defendant which stands for that proposition. The case law is clear that under a per se offense the intent -- the knowledge of the individual engaging in the agreement itself is in fact the intent. It's a general intent crime. And, therefore, any suggestion they would bring in any of this evidence, even notwithstanding the existence of any single entity defense, for purposes of intent, would be completely inappropriate. Altern --

THE COURT: Go ahead.

MR. TERZAKEN: Alternatively, the other argument they've made is this argument about converting this case from a per se case to a rule of reason case. And we just want to make sure that the Court is clear, if it isn't clear under our papers, that under no circumstances would this case be converted from a per se case to a rule of reason case. Even assuming, which is a huge assuming in this particular case, they could make out the single entity defense and were allowed to proceed on it, this case still remains a per se case. Every case cited by the United States is the prevailing law, that is *Palmer*, and Addamax, and *Engine Specialties*, and the others cited by the United

States. Which the question in the case, where a couple is able to bring a valid single entity defense, becomes whether or not the purpose for forming that single entity was to restrain competition. That is whether or not that entity was a sham. That's the ultimate ruling in that case.

THE COURT: As I understand Mr. Sandler's position, the way you would back door this into is a rule of reason case, because he would -- I understand him to say one of the reasons that it was a single entity was because the participates believed it was procompetitive. So, therefore, there would be evidence in front of the jury about the alleged procompetitive nature of the activity.

MR. TERZAKEN: But it still wouldn't -- that procompetitive benefits -- this is an additional point, should we get that far, I anticipate the United States will want to have additional discussions with the Court about what the boundaries would be of the kinds of evidence that could be brought in to prove a single entity defense. Because a single entity defense again, is restricted to trying to determine whether or not there's sufficient economic integration between the parties to any supposed formal business relationship. It's not about demonstrating the procompetitive benefits.

THE COURT: Another way of saying that, and again, I haven't read the cases, I'll assume you're telling me that

in the cases which have recognized a single entity defense, it has not been an element the participants thought it was procompetitive.

MR. TERZAKEN: Because it doesn't go to their intent. It doesn't matter --

THE COURT: It doesn't matter, because what you'd have to establish would be that there was a pre-existing formal business relationship.

MR. TERZAKEN: Pre-existing formal business relationship. And then even, the next threshold, which is really the question, if a question ever went to the jury, is whether the parties to that formal business relationship were so integrated, that is in their operation, in their conduct, that they should be considered to be a single entity. That's the question. We don't get to that question ever in this case because there's no basic factual predicate.

Again, there is no case that has been cited by the defendants, and certainly none cited by the United States, or that the United States is aware of, where a theory has been put forward that you could prove a single entity defense in the absence of a pre-existing formal business relationship by merely stating at the end of the conduct, oh, by the way, you can consider our bid rigging conspiracy to be a formal business relationship because we were very

efficient at it. Those are two very different questions.

THE COURT: Okay. Why don't we -- and I realize that -- I'll let Mr. Sandler respond, but to be efficient, I realize this may not -- since you're on your feet, there may be other people who are going to speak to the various motions. Let's go through these motions one by one now.

MR. TERZAKEN: Sure.

THE COURT: Okay. We've got your motion in limine to preclude evidence or arguments that the defendants were acting as a joint venture. That, I assume, we have discussed.

MR. TERZAKEN: I believe that's correct, yes, Your Honor.

THE COURT: Now we have Mr. Nusbaum's motion in limine to present evidence showing intent to form a single entity, we've discussed that.

MR. TERZAKEN: Yes, Your Honor.

THE COURT: Now we have the United States' motion in limine to preclude expert testimony and compel expert disclosure, that all relates to the single entity. Is there anything else in that?

MR. TERZAKEN: It does, Your Honor. There are some individual points that are made by the government in addition to stating --

THE COURT: Are you the one who's going to argue

that or somebody else?

MR. TERZAKEN: Yes, Your Honor.

THE COURT: Okay. Tell me about that.

MR. TERZAKEN: That particular motion we're focused on the notice of disclosures made by the defendants as to what experts they would call. And they teed up a number of those experts. We honed in specifically on the single-entity-type experts that were being proffered. Our first argument in that regard is no different than all the facts we've been talking about and arguments we've been talking about here today, that is if there is no factual predicate for the defense there is no defense and no need to be calling any experts because that testimony is otherwise irrelevant and prejudicial.

Further, to that, we've also argued that in the event that expert should be called that there are additional things identified in the proffer as to what that expert would testify to that are inappropriate. First and foremost, that he would conclude, for example, come to the legal conclusion on the stand, that all of the market factors at issue here constituted a joint venture. That conclusion is a conclusion as a matter of law. And he can't make that legal conclusion.

And we've cited the case of *McIver* is the governing case there. And we've distinguished *Garrett* and

Karns, which were the cases that were cited by the defendant for purposes of calling an expert to conclude as a matter of law on an inquiry where that particular term, that is a joint venture, has a legal meaning other than that understood by the average layperson.

Further to that we've also argued against that particular expert testifying as to the intent of these particular defendants. Defendants have suggested they may back door their defendant's testimony into this case by having this expert testify what Mr. Nusbaum or Mr. Stollof intended for purposes of their actions. That's inappropriate, not only because intent is irrelevant in this particular case, but it's specifically excluded by the Federal Rules of Evidence under Rule 704.

Finally, there is a broader aspect beyond simply the single entity expert, which really bears more on Defendant Stollof's motion to call a medical expert who would purport to testify that at certain times Mr. Stollof had to go to medical appointments or other things, which may have meant that he didn't appear at certain meetings, that may ultimately come up as part of the testimony. We've argued against introduction of that evidence on a number of grounds, but first and foremost, that it's entirely prejudicial and unnecessary. The probative value that the man went out to doctor's appointment versus its prejudicial

value of his particular health is great here. And we think it should be excluded on that ground.

Second, they haven't properly noticed under Rule 12.2B that this particular expert is going to be testifying to any mental capacity of Mr. Stollof to engage in that agreement. If that's what they're intending to do here, they failed to make that appropriate notice both to the United States and to the Court, and should be precluded from doing so. Finally, I would just state for the record that our motion to preclude that particular expert stands unopposed by Defendant Stollof.

THE COURT: United States motion in limine to preclude introduction of improper evidence or argument. Is there anything in that which is not related to the single entity?

MR. TERZAKEN: Yes, there is, Your Honor.

THE COURT: And I gather Ms. McMillen is going to address that.

MR. TERZAKEN: Yes, Your Honor.

THE COURT: Ms. McMillen?

MR. SANDLER: Could I short circuit this by pledging not to argue anything that's improper?

THE COURT: I know you wouldn't, so you don't need to proffer that.

MS. McMILLEN: We have several in limine motions,

Your Honor. With respect to the one I believe you're talking about, it had -- there was several elements to that motion. One of which was that the defendants be precluded from introducing any evidence as to whether or not anyone, the defendants or others, believed that what they were doing was perfectly permissible or legal. We believe that that sort of testimony is classic lay witness opinion testimony about a legal conclusion and should be precluded on those grounds alone.

THE COURT: It also is immaterial, I gather.

MS. McMILLEN: It's absolutely immaterial since it's a general intent crime. And what they believed -- whether they believed they were doing something legal was -- is irrelevant totally. This is also the motion that touches on evidence of government officials having been aware of or having condoned the activity, which I think you've talked to -- or Mr. Terzaken has dealt with. If there's anything else you would like to know about that one, I would be glad to address it.

Would you like to touch on the other in limine motions that we've --

THE COURT: Sure. Tell me which one you want to address next.

MS. McMILLEN: -- jury nullification.

THE COURT: Which one do you want to address next?

MS. McMILLEN: We have a motion dealing with jury nullification, which is our docket number 50. And the defendant's responses are 91 and 95.

THE COURT: Right.

MS. McMILLEN: Specifically there, the first of those in limine motions is to exclude any evidence and arguments that the rigged bids were reasonable, or that the conspiracy caused little or no harm. And the reason that we're moving to exclude that sort of evidence is because in a per se case, obviously, those things are irrelevant and would be prejudicial if brought in. Defendant Stollof concedes that our position is correct, but argues that the motion is too broad, argues that it would preclude any mention of prices or yields or amounts paid for liens, and that's not what our motion would do.

He also rightly states that a defendant should be entitled to present evidence of prices to prove that the prices in a particular auction were inconsistent with a big rigging agreement. We generally agree with that legal proposition. Although we might disagree with how it is done. However, to the extent Mr. Stollof wishes to introduce this evidence through any sort of expert witness, we don't believe that they noticed us of that in their September 11th filing of areas of expert testimony.

Defendant Nusbaum objects to the notion on the

grounds that the reasonableness of prices and lack of economic harm is relevant and admissible with respect to his single entity defense. And I think we've fully dealt with that. So I will -- I won't go into it.

Second part of that motion deals with moving -- the United States has moved to exclude evidence or argument as to age, illness or financial condition, circumstances that is. Obviously the defendants are both in their 70s, they have various physical --

THE COURT: That's not obvious to me.

DEFENDANT STOLLOF: Thank you.

MS. McMILLEN: I think we were told that at one point on the record, Your Honor. We've moved to exclude evidence of age and ill health because of lack of --

THE COURT: I understand.

MS. McMILLEN: Can I move on from that one, Your Honor?

THE COURT: Beg your pardon? Yes, you may.

MS. McMILLEN: And the last deals with financial condition.

THE COURT: The various things about penalties and charging decisions you need not address those.

MS. McMILLEN: Thank you very much, Your Honor. We also had an in limine motion to exclude advice of counsel defense. And I believe I've touched on that already in

terms of our earlier motion to exclude any discussions about whether or not what the defendants were doing was right or correct or not illegal. And basically for those same reasons we would -- we would seek to exclude it here too.

THE COURT: Okay. What's next?

MS. McMILLEN: I believe that's all that I have for you, Your Honor.

THE COURT: Okay. Mr. Terzaken, what do you want to argue next? I just want to go through all of these, make sure we cover them all.

MR. TERZAKEN: Your Honor, there are a number of other motions that were made, they're all motions that were made by the defense.

THE COURT: Okay. Let me hear your position on them.

MR. TERZAKEN: I have to concede to my co-counsel.

THE COURT: Okay. I think we have the defendants' motion for failure to allege a single conspiracy and lack of jurisdiction.

MR. TERZAKEN: Mr. Grundvig is going to address that argument, Your Honor.

MR. GRUNDVIG: If I could, Your Honor, I'll address both the motion to dismiss the indictment for failure to allege a single conspiracy, along with their similar motion to dismiss the indictment for failure to

state sufficient subject matter jurisdiction. Our response was the same to both, or they dealt with both of those issues the same.

I think as a -- I guess as a starting point, the burden to dismiss an indictment is high because essentially all that the government has to allege are the elements of the offense sufficiently to put the defendants on notice, and such that they can also object to a future prosecution for the same offense. And I think without question the indictment has done that in this case. I think essentially they are confusing a sufficient allegations in an indictment to bring an offense versus the evidence necessary to prove beyond a reasonable doubt commission of the offense at trial. But I can certainly get into the specifics of those if you'd like.

But taking on first the subject matter jurisdiction, the indictment at paragraphs 9 and 10 is -- couldn't be clearer. The paragraph 10 in particular --

THE COURT: Actually, I'll hear from the defendants. If there's something I need after hearing from them I'll --

MR. GRUNDVIG: That makes sense, Your Honor.

THE COURT: Again, I'll hear from -- go ahead, Mr. Terzaken.

MR. TERZAKEN: Your Honor, in terms of the

remaining motions the Court can certainly hear from the defendants as to which of those motions they'd like to argue. I think the Court may have indicated you would like to hear from the United States on the grand jury subpoenas issue -- I mean, trial subpoenas.

THE COURT: Trial subpoenas.

MR. TERZAKEN: We're happy --

THE COURT: It would seem to me, I mean my -- it would seem to me that to some extent the propriety of the trial subpoenas is going to depend upon my ruling upon the single entity defense, at least it's going to inform some. But to the extent that my ruling allowed that motion to go forward, I guess my -- to the extent that the complaint was that the subpoenas were overburdensome, that was an argument to be made by the recipients of the subpoenas not by the government. But I'll hear from you or from whoever's going to address it.

MR. TERZAKEN: Thank you, Your Honor. Mr. Bester is going to address it.

MR. BESTER: Thank you Your Honor, I understand from the telephone conference the other day that you had some concerns about standing, whether the United States had standing --

THE COURT: It wasn't so much formal standing, it was just about who was best to make the arguments. But go

ahead.

MR. BESTER: I wanted to just point out to the Court that although it wasn't addressed in the papers there certainly are District Courts that have found that the United States has standing when considering the issuance of pretrial subpoenas. The *United States versus Wittig* and *United States versus Beckford* both found that the United States has standing when a motion has properly been filed with the Court. As a party to litigation the United States has standing to come forward and raise its objections.

In that *Wittig* case, though, the Court while it found that the United States had standing, it said that it's a nonissue. As Your Honor's well aware, ultimately you have the authority and responsibility to make sure that Rule 17, and the case law that flows from it, is adhered to. And that the subpoenas that are issued comply -- comport with those requirements. Here, the subpoenas, as Your Honor has made note, mainly seem to be concerned with the single entity defense. And depending on Your Honor's ruling on that issue, I think will inform the issuance of these pretrial subpoenas.

But to the extent they don't, to us these subpoenas look like a fishing expedition. The language contained in those requests is very vague. It asks for any and all documents. It's asking for personnel records.

Those seem to me to be much more like civil discovery requests rather than a pretrial subpoena in a criminal matter. As you're well aware, the *Nixon* case governs these issues. And the requirements of *Nixon* must be met before Rule 17 subpoenas can be issued. And those requirements are that the -- the subjects in those subpoenas must be relevant, admissible and specific. And I would submit that the subpoenas issued here, or proposed to be issued here, do not meet those factors.

The Court was very clear that rule 17 cannot be used as a discovery device. That the Rule 17 subpoenas need to be much more narrowly tailored than a common discovery tool. In *Nixon* the prosecutors were seeking specific tapes with specific conversations on them. The prosecutors were able to identify the time, the place and the participants in those conversations that they were seeking. By contrast here, the request for documents seem to be much, much broader. They don't specify the recipients. They don't specify the dates. And for those reasons it appears that this is much more of a fishing expedition than a narrowly tailored request for documents pretrial.

Further, the defendants have much of this material already. We have produced a great volume of information back in July. And there is no mention in any of the papers by the defendants of whether the recipients of these

proposed subpoenas have -- they have produced this, they've seen it already, we don't know. At a minimum the defendant should be required to tell the Court which of the material they already have before going and asking these subpoena recipients for the same information again.

There's other information that appears wholly irrelevant to the matters of this case. There are requests for materials for internal investigations. There's material, as Your Honor is aware, seeking materials for joint ventures and whether there was a joint venture. As you've heard today there is no joint venture in this matter. And, therefore, documents requesting materials related to a joint venture are simply a red herring here.

The internal investigation documents sought, again, are irrelevant to the consideration of the issues in this case. As for the proposed subpoenas directed at the municipalities, this is material, as I mentioned, that at least it appears from the way that those requests are phrased here, and the materials already produced to them over the summer that they is have much if not all the information that was requested there. So for those reasons I would urge the Court to block the issuance of these subpoenas.

THE COURT: Okay. And, again, I realize they're defense motions, but since the government's on its feet.

The motion by Mr. Nusbaum to exclude the admission of alleged co-conspirator statements absent a pretrial showing. Isn't that just governed by 4th Circuit law?

MR. GRUNDVIG: It is, Your Honor.

THE COURT: Okay. I'll ask Mr. Sandler about that.

MR. GRUNDVIG: I think this issue is largely moot, we've produced the 302s and the interview memoranda to the defendants.

MR. SANDLER: We agree.

THE COURT: Okay. So that's moot. I'll deny that one as moot. How about the use of guilty pleas and plea agreements?

MR. GRUNDVIG: Your Honor, we're certainly happy to stand on the papers that have been filed. It's fairly clear law on that. We can address any questions you might have.

THE COURT: Frankly, I thought I had read all these. I haven't read this.

MR. SANDLER: We'll defer on the papers.

THE COURT: Yeah, let's defer. I'll deny it without -- I'll deny it subject to being renewed at trial.

MR. SANDLER: Well --

THE COURT: I mean, the fact of the matter is plea agreements are going to come in -- evidence about plea

agreements is going to come in. I tend not to allow plea agreements themselves into evidence, different judges have different practices. I tend not to do it because, if for no other reason, plea agreements contain statement of facts which I don't think ought to be back in the jury room because they're, you know, by virtue of the fact that the defendant pled guilty they're pro-government. Another way to do that is to redact that. But that's something you can -- that to me is a trial issue.

MR. GRUNDVIG: And maybe slightly separate question is the defendant that raises this motion is seeking to allow himself to introduce the existence of a plea. To preclude the government from doing it in direct examination --

THE COURT: I'm not going to let them do that. I understand the position, but it's established practice that the government can produce evidence in its own examination of its cooperators that that person is a cooperator. You can certainly cross-examine. I'm going to go with established practice on that.

MR. GRUNDVIG: Thank you, Your Honor.

THE COURT: So it's denied. But is there any -- it's denied without prejudice being renewed. I just see it as a trial -- you know what I'm going to rule.

I'm going to deny as moot the motion to exclude

evidence of income, assets and financial means, but also because the government's not going to try to put that in.

MR. TREEM: Your Honor, do I infer correctly that you're going to deny the defense the opportunity to elicit that kind of information in cross, perhaps.

THE COURT: Of Mr. Nusbaum?

MR. TREEM: Of either on behalf of Mr. -- on behalf of Mr. Stollof, I can't speak for Mr. Nusbaum.

THE COURT: But this is Mr. Nusbaum's motion to exclude evidence of income asset -- I assumed that was Mr. Nusbaum's.

MR. TREEM: Fine, as long as that's limited to Mr. Nusbaum that's fine. Because we don't -- because we have an interest in that evidence on behalf of Mr. Stollof coming in, at least to some extent. And I'd like to at some point address that.

THE COURT: As to Mr. Nusbaum?

MR. TREEM: No, it's Mr. Stollof, Your Honor. Thank you.

THE COURT: This motion I understood to be related to Mr. Nusbaum.

MR. CRALLE: Your Honor, part of this is moot. But as to the income that is not. And if you would like to hear that, we'd be happy to address it.

THE COURT: I'm going to deny it without prejudice

to being renewed. This really is a trial issue. When I say -- it's generally without prejudice. I mean, it doesn't make any sense for me to decide it now. Compel disclosure of confidential witnesses.

MR. SANDLER: It's moot, Your Honor.

THE COURT: It's moot. Denied as moot. Inspection complete FBI 302 reports.

MR. SANDLER: Moot.

THE COURT: Moot. For leave to file additional motions. If after today anybody wants to file an additional motion, they can file an additional motion, it's a free country. 404(b) evidence and any alleged acts falling outside the statute of limitations. Who wants to address that? I don't remember what the issues are. I read this once. I don't remember what the issues are.

MR. CRALLE: I'd be happy to address it, but as we've said we're not aware of any 404(b) evidence. To the extent we become aware of it we'll give reasonable notice.

THE COURT: If you don't let them know about it, you can't introduce it. So that's an easy one. Rule of inclusion as it is.

All right. Let me hear from any defendant on any of the motions, either rebuttal on the single entity, or any of the other motions they want to address.

MR. SANDLER: May it please the Court, I thought I

would do the rebuttal and certainly Mr. Treem can then articulate what he wishes.

THE COURT: Absolutely.

MR. SANDLER: I am not going to reargue, that's not the purpose of rebuttal. But I am going to point out to you some issues that we do think are incorrect. And remind the Court that the document that I handed, I would like to have it marked as motion Exhibit 1. And when Mr. Esworthy brought it forth, we didn't state that. Will you accept it as Exhibit 1?

THE COURT: Yes.

MR. SANDLER: Thank you. And should I, after the Court should I mark it with the label because we didn't do that.

THE COURT: Well, Martina's not here, Ben can you get a -- I'm going to take one with me too, so if you've got an extra copy give one to Ben to be marked.

MR. SANDLER: Yes. And I also, if you noted, Exhibit 1 is preliminary proffer, because when we spoke on Wednesday and I saw the direction, which I welcome, in which we were going, it was not possible for me to bring my expert witnesses here. One is in South America. One is not -- the other's not available. But I would suggest to you that before you conclusively send the piercing arrow to the heart of the defense, that you consider the balance of the

proffer.

And I point out to you, I once read this comment by Schopenhauer, I don't know if it's applicable, but he described the difference between brilliance and genius. He said that a brilliant person could take an arrow, aim it at a target and hit the bull's eye that no one else could. He said, the genius can aim the arrow at the target that no one else can see and hit it. I'm neither brilliant or a genius, just a trial lawyer taking the facts and applying the law. And the first point that I dispute with the government is that when they talk about other co-conspirators and no agreements, that is incorrect. There are 302s that have other agreements acknowledged by co-conspirators. And one of them is even in writing. So I attribute that just to oversight.

I also point out to Your Honor that much -- I'm talking about DeLaurentis, and Rieff, Counsel. I also point out, with all respect, that much of what the government presented by way of its reply supports the position of the defendant. And was speculative and argumentative in terms of how the case could come out, to try to go -- it goes to the weight and not the admissibility of what I seek to present. Remember, my threshold, I respectfully suggest, is very little. And the case law is clear that these issues are for a jury. That's my interpretation of the cases, the

Continental Baking Company case is one that's specific in that regard. And there are others that I suggested.

But now let's go to the heart of my rebuttal, which will be brief. The government which you -- which I understood and could never doubt, acknowledges the validity of the single entity defense. There's nothing more to say. So when I began with you at the very beginning, couple of hours, and once again, we all appreciate your patience and courtesy. When I began --

THE COURT: You alluded as though that was unexpected.

MR. SANDLER: Well, it's always expected in my experience.

THE COURT: Go ahead.

MR. SANDLER: It's always expected in my experience, Your Honor. But on the other hand, when I know Your Honor has made up his mind --

THE COURT: I haven't made up my mind. I just wanted exactly what you've given me today.

MR. SANDLER: Now, when I talked to you at the very beginning, I suggested to you that we would show the elements of the single entity unit, which in this case was a joint venture. And I suggested to you at the beginning that I was going to appeal to your logic, not emotion, not passion, but what Aristotle called logos, pure logic,

deductive analysis, major premise, minor premise and conclusion. The major premise has been conceded by the government. Single entity is a defense to the bid rigging case, which really dispels some of your concern about sending antitrust law on its head, because it's already acknowledge, and of course it's acknowledged because that's the law.

So the only question that -- in terms of this proffer that we need to wrestle with is whether the minor premise flows. And the minor premise is that the single entity is exhibited by the conduct of these individuals. Now, what the government does is really interesting, they talk about where's the formal agreement, where's the formal writing, but under RUPA that's certainly not even required. What's RUPA? RUPA is the Revised Uniform Partnership Act that's followed by Maryland. And my expert, Mr. Booth, in the tab gives some explanation of that, but it's not the full report. I'd like to --

THE COURT: I don't want to be overly simplistic, but isn't it as simple as, where is there any evidence of a joint venture other than the engaging in the bid rigging? I mean, it really is as simple as that. I mean, in the other cases there is evidence of a relationship, I mean, that's what this is all about. I'll go back and read your proffer, but it seems to me that -- that seems to me is the issue,

there has to be a joint venture other than the illegal agreement.

MR. SANDLER: Well, I share with you what that is, I'll repeat it.

THE COURT: No, we've been over that. I'm going to read it, but I --

MR. SANDLER: I'm not going to read it. You can look in the proffer book. They have those elements. They shared the profits, they shared the risk, they meet the --

THE COURT: They shared the risk of the --

MR. SANDLER: Sure, they put up -- they each put up their money. They each brought $20 million to the table. They each relied on each other. They shared the risk of getting the bids, not getting the liens --

THE COURT: That's all inherent to the bid rigging.

MR. SANDLER: It's all inherent to the joint venture.

THE COURT: Which is the bid rigging.

MR. SANDLER: Not if it's econ -- a bid rigging -- I would say the anecdote to bid rigging is whether or not the relationship generated the efficiencies of economy. And those efficiencies of economy are crucial. Under your thinking --

THE COURT: But that's where you're turning

antitrust law on its head, because then you're turning every per se case into a rule of reason case, because you're allowing a defense to be proffered that this was procompetitive, and so therefore, it's not actionable. And that's why this is not just a jury determination, it's a question of law. The law is clear, right or wrong, that there are certain kinds of activities which are per se illegal even if they're procompetitive.

MR. SANDLER: I'm not asking that, though. I agree with the government that the procompetitiveness is not the aspect of the joint venture, it's the result. But you first have to have the valid joint venture. You first must have the economic efficiencies. Here's what the government in their brief claims, by the way, I think this should be of interest to you, respectfully. Says in order to have this joint venture, to show a joint venture -- I'm quoting on page 3 of their response in limine to preclude evidence of the joint venture. They say that to show a joint venture in the absence of a written agreement, so they acknowledge you can have a joint venture without a written agreement, you have to -- you should have a proprietary interest, a pooling of assets and/or capital over the subject of the undertaking, and you should have joint control of the undertaking. That's all you have to do.

And what you're trying to do is read more into

what's required. What's required for the joint venture is minimal. And under the -- under -- I put it to you respectfully, that if you share capital, if you share computer consultants, if you share resources of a computer software and hardware, if you share your profits, if you get together and share your trade secrets with each other so that you jointly can proceed and divide the profits, that's a joint venture. And that's a question that's easily answered. And that's for the jury to decide.

THE COURT: But isn't -- again, I'll read the cases, and maybe I'm -- but I think Mr. Terzaken referred to as a pre-existing business relationship. Another way to say that is it is a joint venture extrinsic to the bid rigging itself. I mean, is there any case in which, you know, there's relationship between parents and subsidiaries, there was a former joint venture in the Supreme Court case, there is the NFL case, there's a franchise, franchisee case, I assume that's what it is. There is extrinsic to the alleged illegal conduct, there is an existing business relationship.

MR. SANDLER: No, I mean absolutely not. I mean the *Texaco Dagher* case they were prior competitors and they formed this other entity and they went forward. That's incorrect interpretation of law I respectfully suggest. And you can't criticize the government, I can't, for wanting to hold firm because they recognize what they're policy -- it's

been -- they have a very stern policy. And they want to come, you know, they run with a hammer and every nail gets hit. And this is one of them, in my interpretation, based on these facts, which I'd like to present to the jury.

It's important to know that I do not think the procompetitive impact is part of the economic efficiency. What I'm saying to you is you need the joint venture, you need the economic efficiencies, and you need the procompetitive impact. And that's why every bid rigging is not a joint venture. You can't do that in 99.9 percent. First of all, most of the bid riggings are lower, not higher. Most of the bid riggings aren't open to the world. This is a very unique case.

And I respectfully point out to the Court, synopsis to the Court, I must have looked at hundreds of cases and hours of studying trying to find precedent. There is none. So I'm out here in almost a case of first impression in this regard. But please do not fail to consider the logic that I'm trying to present to you. If all the -- ask yourself one question, if this were a common law case that we were in civil court in the state of Maryland, and say it went up on appeal, the Court of Special Appeals, and Judge Hollander, for example, was looking at this, would she analyze -- if this were just a joint venture, could she find if expert testimony was helpful to

explain this to you or to the jury that this relationship constituted a joint venture.

Because if you say to yourself that under no circumstances, giving it the best light to me, all I said to you in terms of the sharing, the drawing the capital together the resources, the computer experts, sharing the messenger, dividing the profits. In one instance which I showed you, one got zero the other then equalized. If you're saying that under no circumstances could that be a joint venture, in other words, in civil law you would say, Mr. Sandler, this could never go to the jury, summary judgment granted. If that's your conclusion, based on these facts, I still should win, because my burden is even less in this criminal case.

THE COURT: Let me ask you one other thing. It just occurred to me, and I could be wrong about this, you keep emphasizing it's already here. It's odd because the rigging results in the high bidder always wins. And maybe the government, I assume, maybe it's a per se violation, per se violation, but the theory is that there would have been a higher -- there might have been a potential higher bid, because these two people were -- these people were bid rigging, so there could have been still a higher bid.

MR. SANDLER: That's a factual issue.

THE COURT: I assume that's the theory of the

government's case. It's no answer to say, here the high bidder won, the whole problem was, at least theoretically, there would have been a higher bidder.

MR. SANDLER: Well, that's what they would say, and we would of course dispute that.

THE COURT: I just want to make sure that I understood the government's theory.

MR. SANDLER: I'm saying to you, we've got major premise resolved, minor premise I'm saying to you that based on the fact --

THE COURT: The major premise is conceded. I understand. But let me ask the government one thing because it is something which I've got to reread the case, how -- is the extrinsic intrinsic distinction I'm drawing correct? And if so, how does the Supreme Court -- what I'm saying is, is the pre-existing relationship, is a joint venture extrinsic to the alleged illegal conduct?

MR. TERZAKEN: The answer is I don't think a court has ever said it that clearly, but it certainly can be inferred in the way the case law --

THE COURT: How about the Supreme Court case, was there any --

MR. TERZAKEN: The Supreme Court case wasn't addressing that, because there was already a business relationship.

THE COURT: Was there a business relationship for any purpose other than the purchasing on the market?

MR. TERZAKEN: That was a different question, yes. It was formed -- this was a formal joint venture between the parent -- or sorry, between the joint venture partners, they created a third entity called Equilon, which they wanted to put their assets.

THE COURT: But did Equilon have any other purpose other than --

MR. TERZAKEN: It was to put in the assets in to jointly market these two brands of gasoline that these companies were independently marketing on their own.

THE COURT: So they had a purpose other than purchasing the fuel on the market, which was the alleged bid rigging.

MR. TERZAKEN: The sale of the fuel, that's exactly right.

THE COURT: If no court has said it so clearly, I'm neither brilliant nor a genius, is there a valid distinction between the extrinsic and the intrinsic.

MR. TERZAKEN: Yes. Well, let me put this way, first there's no case law cited by the defendant, and none the United States is aware of where this theory has ever been put forward to a court. I think because it's nonsensical on its face, for all the reasons we discussed,

that it would turn antitrust law on its head. Every case that the Supreme Court or other courts have considered, were exactly the kinds of pre-existing business relationships that had extrinsic value beyond simply rigging bids or fixing prices --

THE COURT: For purposes. Okay.

MR. TERZAKEN: For a particular purpose. Now follow that on with the cases we've also cited, what happens in this case, if there is in fact a formal business relationship, and the defendants were then allowed to argue the other factors that go into the single entity defense. What the Courts have then said is, the question isn't about the extrinsic parts necessarily of that organization, but what the purpose was for forming it in the first instance.

And that's why even in the event they were allowed to bring this defense, the question is whether or not they label they want to put on it is a sham. That's the holding of *Palmer* and Addamax. So I think the Court is completely correct in reading exactly that fact. Because that's the question you get to once you show the formal business relationship is next. What was the purpose for forming it? Is it a sham or was it for all these other reasons? We never get out of box No. 1 to get to those latter questions.

MR. SANDLER: I respectfully -- I must respectfully disagree with learned counsel. I have read

Dagher, I do not read it the way he reads it. I read out of it, not into it. And I know that historically Texaco and Shell Oil competed with one another in the national, international gasoline markets. And their business was head to head competitors. And they formed this business solely for this joint venture, solely for this one undertaking. And I say to Your Honor, it matters not in the law whether there's a written formal agreement or not. And there's never any discussion -- I think counsel finally conceded or not -- finally recognized it, that there's no extrinsic intrinsic issues in this.

The major premise is conceded by the government because it's the law. And in terms of where I'm going now in trying to wrap this up is to ask Your Honor to focus on what it is to have a joint venture. It's very little. To understand what the Maryland law is about joint ventures. That this is a joint venture. And then the final point is whether the joint venture exhibited economic efficiencies. And for me to convince you of that. Even though it's not the trial. Even though it's not my closing argument. I need to bring the experts here. So that they can testify and -- or at least produce their reports so that if the government wants to examine, to demonstrate that the economic efficiencies exist. Because my saying so isn't enough. Because I am not an antitrust specialist.

THE COURT: I understand. Does any defendant want to be heard on any of the other pending motions?

MR. SANDLER: Thank you, Your Honor.

MS. GALLAGHER: Your Honor, very briefly on our jurisdictional motion, the failure to allege a single conspiracy and the motion to dismiss for lack of jurisdiction, we're going to submit on the papers. We recognize that further exposition of the facts might be necessary for the Court to make a final decision on those issues.

THE COURT: Thank you.

MR. TREEM: And, Your Honor, just to comment or respond to the government's argument that we haven't filed notice of experts with respect to Mr. Stollof's illness or potentially his competence. The government can infer that we don't intend to call any experts with respect to that particular issue. And the same with respect to the pricing expert. But I do want to respond to the in limine motion with respect to age, illness, financial condition.

The government has to prove that Mr. Stollof knew the nature and scope of the agreement that they have alleged that he participated in. And issues concerning his knowledge, his participation, his association with other co-conspirators, are very much at the heart of that. You know, mere association isn't enough. And mere participation

without knowledge isn't enough. I mean, the threshold -- the threshold case of the government is that Mr. Stollof had to know that he was entering into an agreement, the object of which is described in the indictment.

And so I think it is premature, at least at this stage, to cut us off at the knees without having had the trial at least commence where these issues of relevance, which is what really they are all about, come into play. If we ask a question that the government thinks is improper, then they will object and the Court will rule. And I think that's --

THE COURT: As long as you're not suggesting that if you're 70, you can't understand --

MR. TREEM: Oh, no, not at all, Your Honor. I'm rapidly getting there. And I'd like to think that that won't be the case.

THE COURT: Okay. I'll reserve -- to the extent that it's relevancy, Mr. Treem, you know the mere fact that somebody doesn't feel well or is ill or is old, you're going to have a tough time with me on that, but I'll reserve ruling on that.

MR. TREEM: Thank you, Your Honor. That's all I have.

THE COURT: Or relatively old. All right. I'm not even sure I'm going to formalize all the rulings on the

smaller motions. I will defer ruling on the big issue, which is the joint venture issue. I'll take a look at the proffer, that is what I needed to see, to make some -- to put it in proper context. I'll issue an opinion. I will, depending upon that ruling, I may grant the motion for the third party subpoenas because obviously -- excuse me, if I find -- basically if I find the single entity defense is not viable, those subpoenas ought to be rethought and reissued, if there's anything left to find there. So that's related. But I will -- I don't expect -- I may write a long opinion, I probably won't. I'll take a look at the proffer. The big issue today, obviously, is whether I'm going to allow the single entity defense. Thank you.

MR. SANDLER: May it please the Court, would it be helpful, and I'm not trying to overburden the Court, would it be helpful for the two expert reports --

THE COURT: No.

MR. SANDLER: It would not.

THE COURT: Absolutely not. Let me say it this way, if I decide after reviewing the papers it would, then I'll let you know.

MR. TERZAKEN: Your Honor, certainly no discredit to defense counsel, but the United States has not had an opportunity to review this supposed factual information they've presented or in the form it's been presented.

THE COURT: If you want to submit any response to it, when can you do it?

MR. TERZAKEN: We could certainly do it, but it includes expert testimony for an expert who hasn't been qualified before this court.

THE COURT: Don't do anything with it unless -- I'll take a look at it. Mr. Sandler's made a good argument. I'll take a look at this. If I was going to rule from the bench right now I wouldn't allow the single entity defense.

MR. TERZAKEN: Thank you, Your Honor.

MR. SANDLER: Thank you, Your Honor. I want to mark officially this exhibit.

THE COURT: Thank you. I'm saying that only in terms of guidance. If I change my mind on that, I'll give you a chance to respond.

(The proceedings were concluded.)

I, Christine Asif, RPR, CRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

_____/s/_____
Christine T. Asif
Official Court Reporter